

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA)	
)	
vs.)	CRIMINAL ACTION 08-00384-KD
)	
CHRISTOPHER WAYNE CLENDENING)	
)	
Defendant.)	

ORDER

This matter is before the Court on the joint motion to set aside guilty plea (doc. 48). A hearing on the motion and change of plea hearing were held on June 5, 2009. Present at this hearing were defendant Christopher Wayne Clendening, defense counsel Richard Shields, and Assistant U. S. Attorney Daryl Atchison, counsel for the Government.

The parties move the Court to set aside defendant's guilty plea as to Count Four of the Indictment, which alleges a violation of 18 U.S.C. § 1028A(a)(1), aggravated identify theft. As grounds for the motion the parties set forth that on May 4, 2009, after the defendant had entered his plea of guilty to Count Four, the Supreme Court decided United States v. Flores-Figueroa, 129 S.Ct. 1886 (2009). The parties assert that the Supreme Court's ruling regarding the *mens rea* required for violation of 18 U.S.C. § 1028A(a)(1) invalidates the defendant's plea as the Government is unable to sustain its burden of proof on the *mens rea* element.

Upon consideration of the motion, the argument presented at the hearing, and for reasons more specifically set forth on the record, the court find that defendant has shown a fair and just reason for the withdrawal of his guilty plea based on the Supreme Court's post-plea decision. See Fed.R.Crim.P. 11(d)(2)(B) ("A defendant may withdraw a plea of guilty . . . [if] the

defendant can show a fair and just reason for requesting the withdrawal.”). Therefore, the motion to set aside defendant’s plea of guilty to Count Four is **GRANTED**.

Defendant entered a plea of guilty to **Count Three** of the **Indictment**, charging the offense of **Title 18, United States Code, Section 1029(a)(3), access device fraud**. Defendant's guilty plea was accepted and defendant was found guilty as charged.

Defendant shall appear for sentencing on **Thursday, July 2, 2009 at 9:00 a.m.**, Courtroom **5A**, U. S. Courthouse, Mobile, Alabama.

An amended presentence investigation report shall be completed by U. S. Probation and disclosed to the parties on or before **June 15, 2009**.

On or before **June 26, 2009**, the parties shall each file a "Position of (United States) (Defendant) with Respect to Sentencing Factors" in accordance with this Court's Standing Order Number Five. All other requirements and deadlines of that Standing Order shall be strictly observed and enforced.

In the event that the parties chose to file a Sentencing Memorandum, it shall be due seven (7) days prior to the date of sentencing. In the event that the parties decide to file a Motion to Continue Sentencing based upon defendant's incomplete cooperation with the Government, the motion shall be due four (4) days prior to the date of sentencing.

Defendant shall remain on bond pending sentencing.

. **DONE and ORDERED** this 10th day of June, 2009.

s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE